

BEFORE THE COMMISSIONER OF INSURANCE
OF THE STATE OF WASHINGTON

In the Matter of

No. G02-45

THE APPLICATION REGARDING
THE CONVERSION AND
ACQUISITION OF CONTROL OF
PREMERA BLUE CROSS AND ITS
AFFILIATES

REPLY TO OIC STAFF'S RESPONSE
REGARDING THE *IN CAMERA*
PRIVILEGE REVIEW

On July 23, 2003, the OIC Staff filed a Response to Premera's Proposed Order Regarding the *In Camera* Privilege Review. PREMERA and Premera Blue Cross (collectively, "Premera") offer this reply.

1. Specific word changes.

- Paragraph 1: On page 3 of his Scheduling Recommendation (July 7, 2003), Judge Finkle directed Premera to "produce to me for *in camera* review all privilege log documents requested by the consultants" Premera has been preparing to do just that, using the OIC Staff's submissions to Judge Finkle on June 30, 2003, to identify the documents being requested by the consultants. The wording change requested by the OIC Staff will multiply Premera's workload, as well as Judge Finkle's, by requiring explanation and review of documents (e.g., PPRE 21-130) that the consultants have said they don't need. This is pointless and could make it more difficult to meet the July 28, 2003, deadline. (In addition, Premera produced two privilege logs to Judge Finkle on June 30, 2003, not one.)
- Paragraph 3: Premera objects to the suggestion that documents "should be disclosed for some other reason" notwithstanding their being privileged, protected by the work product doctrine, or both. The issue at hand is whether or not the documents are privileged; if they are, the OIC Staff has acknowledged that they must be left alone. On the other hand, Premera agrees with the OIC Staff that redaction is a potential outcome of Judge Finkle's review, although the roles of decision maker and physical redactor should not be confused. Premera suggests the addition of the following language after the second sentence of Paragraph 3: "Judge Finkle will also decide if any Disputed Privileged Documents should be redacted, allowing unredacted portions to be disclosed."
- Paragraph 4: The OIC Staff's suggested change does not work. If a document is either privileged or protected by the work product doctrine, it should not be produced.

1 A document should be produced only if it is determined to be both unprivileged *and*
2 unprotected.

- 3 • Paragraph 6: Premera does not understand the purpose of the additional language
4 proposed by the OIC Staff. Determinations as to privilege and work product
5 protection do not depend upon the nature of the proceeding in which the issue arises.

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8 2. Substantive changes.

- 9 • Paragraph 4: Premera believes that the language it proposed on July 22, 2003, will
10 facilitate the speedy resolution of any disputes that may remain after Judge Finkle
11 makes his decision. Premera does not anticipate that there will be such disputes but
12 believes that the Order should address that possibility.
- 13 • Paragraph 5: Premera believes that the last sentence would avoid unnecessary
14 disputes in the future. It is therefore worth including.
- 15 • Paragraph 6: The language proposed by the OIC Staff for Paragraph 6 is inconsistent
16 with the scope and purpose of Judge Finkle's review. Judge Finkle's Scheduling
17 Recommendation contemplated *in camera* review solely to determine whether
18 documents requested by the consultants are privileged or not. The OIC Staff's
19 language would have Judge Finkle evaluate the "relevance" of the documents as well.
20 Premera objects to the OIC Staff's proposal as raising new issues. In addition,
21 accepting the OIC Staff's proposal would materially change Judge Finkle's task,
22 enlarge the time required to perform it, and potentially create confusion about his role.

23 The Commissioner's Order should be crafted to achieve its intended purpose: making
24 sure that *in camera* review proceeds promptly, without itself giving rise to any later arguments
25 about waiver of privilege.¹ Premera appreciates the Commissioner's concern and trusts that
26 the intended purpose will be fulfilled.

DATED this 24th day of July, 2003.

Respectfully submitted,

PRESTON GATES & ELLIS LLP

By Robert B. Mitchell
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Attorneys for Premera

¹ The Intervenor's proposed modifications are inconsistent with that goal. Premera also does not agree with the Intervenor's contentions. In particular, nothing in Paragraph 3 precludes Judge Finkle from documenting the reasons for his decision regarding the Disputed Privileged Documents.

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of the Application
Regarding the Conversion and
Acquisition of Control of Premera Blue
Cross and its Affiliates

No. G02-45

CERTIFICATE OF SERVICE

I, Dennis M Tessier, certify that I served a copy of the following document(s):

1. **REPLY TO OIC STAFF'S RESPONSE REGARDING THE IN CAMERA
PRIVILEGE REVIEW**
2. **CERTIFICATE OF SERVICE**

on all parties or their lead counsel of record on the date below as follows:

Service To:	Service Perfected By:
Carol Sureau Deputy Insurance Commissioner Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501 P.O. Box 40255 Olympia, WA 98504-0255 (Original & 4 plus 1 Electronic by E-Mail)	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By E-Mail
John F. Hamje Legal Affairs Division Office of the Insurance Commissioner	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service

CERTIFICATE OF SERVICE - 1

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5000 Capitol Boulevard Tumwater, WA 98501 P.O. Box 40255 Olympia, WA 98504-0255	<input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail
James T. Odiorne Deputy Insurance Commissioner Office of the Insurance Commissioner 5000 Capitol Boulevard Tumwater, WA 98501	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail
Amy McCullough Alaska Legal Services Corporation 1016 West 6 th Avenue, Ste. 200 Anchorage, AK 99501	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By E-Mail
Eleanor Hamburger John Midgley Columbia Legal Services 101 Yesler Way, Suite 300 Seattle, WA 98104	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail
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Jeff Coopersmith Coopersmith & Associates, Inc. 701 Fifth Avenue, Suite 4200 Seattle, WA 98104	<input checked="" type="checkbox"/> By United States Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Legal Messenger Service <input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

CERTIFICATE OF SERVICE - 2

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1 DATED this Thursday, July 24, 2003.

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CERTIFICATE OF SERVICE - 3

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